Tax Notes Today

JUNE 01, 2015, MONDAY

DEPARTMENT: News, Commentary, and Analysis; News Stories

CITE: *2015 TNT 104-5*

HEADLINE: #5 2015 TNT 104-5 LICENSURE, GEOGRAPHY DON'T MATTER IN CIRCULAR 230 REASONABLENESS. (Release Date: MAY 29, 2015) (Doc 2015-12728)

ABSTRACT: When examining the reasonableness standards under Circular 230, the IRS Office of Professional Responsibility will not make distinctions based on licensure or geography, outgoing OPR Director Karen Hawkins said May 29.

SUMMARY: Published by Tax Analysts(R)

When examining the reasonableness standards under Circular 230, the IRS Office of Professional Responsibility will not make distinctions based on licensure or geography, outgoing OPR Director Karen Hawkins said May 29.

"You're all federal tax practitioners. You are all following the same rules. You've got the same statutes you've got to know [and] know them at the same level to give competent advice. Why should I be applying different standards to you, just because you are an enrolled agent versus a lawyer?" Hawkins said at the Federal Bar Association Insurance Tax Seminar in Washington.

In June 2014 the IRS issued final regulations (T.D. 9668) governing practice standards that replaced rigid rules for written tax advice with more flexible rules and eliminated the need to provide disclaimers in some written tax advice. Included in the rules are standards that require practitioners to base the written advice on reasonable factual and legal assumptions, reasonably consider all relevant facts and circumstances that the practitioner knows or reasonably should know, use reasonable efforts to identify and ascertain the facts relevant to written advice on each federal tax matter, and not rely on representations, statements, findings, or agreements of the taxpayer or any other person if reliance on them would be unreasonable.

"We're talking about the reasonable practitioner concept. For some reason, people don't seem to be clear on whether that is a national standard or a local standard," Hawkins said. "This is federal practice . . . I'm not going to make a different ethical standard for someone in Des Moines, Iowa, than for someone in New York City."

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GEOGRAPHIC: United States

REFERENCES: Subject Area:
Practice and procedure;
Professional responsibility

TEXT:

Release Date: MAY 29, 2015

Published by Tax Analysts(R)

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In June 2014 the IRS issued final regulations (T.D. 9668 (Doc 2014-14374)) governing practice standards that replaced rigid rules for written tax advice with more flexible rules and eliminated the need to provide disclaimers in some written tax advice. Included in the rules are standards that require practitioners to base the written advice on reasonable factual and legal assumptions, reasonably consider all relevant facts and circumstances that the practitioner knows or reasonably should know, use reasonable efforts to identify and ascertain the facts relevant to written advice on each federal tax matter, and not rely on representations, statements, findings, or agreements of the taxpayer or any other person if reliance on them would be unreasonable. (Prior coverage (Doc 2014-14378).)

"We're talking about the reasonable practitioner concept. For some reason, people don't seem to be clear on whether that is a national standard or a local standard," Hawkins said. "This is federal practice . . . I'm not going to make a different ethical standard for someone in Des Moines, Iowa, than for someone in New York City."

She added, "The expectation is precisely the same."

Hawkins did note that under section 10.36, which provides procedures to ensure compliance with Circular 230 and which dictates that firms take reasonable steps to comply with Circular 230, reasonable steps would be significantly different for a two-person firm than for a multinational firm.

"People have asked for my office to put out guidance on what it means to take reasonable steps," Hawkins said. "I'm very reluctant to do that because I don't want to burden the smaller practices with onerous expectations, and I already know that most of the big practices are doing a lot of stuff . . . because they are just general risk managers all the time. This is just a piece of it."

When IDR Responses Become Advocacy

Responding to a question about when a corporate officer's response to an information document request may become advocacy that would require a power of attorney, Hawkins said it would depend on whether the officer was "getting ready to put [their] gloves on" or was merely providing a factual answer. (Prior coverage (Doc 2015-852).)

"If the IRS is just saying, 'How'd you get to that number?' then you are giving them pretty neutral information," Hawkins said. She contrasted that with inquiries in which the IRS asks for a taxpayer's basis for its position, though she said this "gray area" would allow an officer to cite the statute, regs, or case law it relied on without crossing over into advocacy. "But, when they come back and say, 'Well, we think your analysis doesn't work,' and they start telling you why and you start arguing with them, I think you've crossed the line."

In September 2014 the OPR released guidance (Doc 2014-21973) saying that if the corporation wants a specific employee to advocate, negotiate, or dispute issues with the IRS for the corporation, then a Form 2848, "Power of Attorney," must be obtained from the corporation authorizing that representation. The form must be signed by a duly elected officer or director of the corporation. The guidance provides that a Form 2848 submitted to the IRS is one source of evidence of practice for purposes of establishing Circular 230's jurisdiction over the individual designated on the form.